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HAROLD B. WILLEY, Cl

IN THE

Supreme Court of the United States

No. 790

October Term, 1955

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,
v.
SALES DRIVERS, HELPERS & BUILDING CONSTRUCTION DRIVERS, LOCAL UNION 859, OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL-CIO, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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This reply is filed on behalf of respondent Sales Drivers, Helpers & Building Construction Drivers, Local Union 859, of International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO, petitioner below and respondent in the proceedings before the National Labor Relations Board which was the subject of the appeal below.

OPINION BELOW

The opinion of the Court below (Appendix A of Petition) is reported at 229 F. 2d 514 (Adv. Sheets).

JURISDICTION

The statement respecting jurisdiction is adequately set forth in the Petition herein.

QUESTIONS PRESENTED

1. In order to fit the facts of this case, the question presented herein, as set forth by petitioner (Petition, p. 2), must be supplemented as follows:

More specifically, may the Board so conclude in circumstances where the employees of the primary employer spend a major portion of their working time at the common work situs and only a minor portion at that employer's separate place of business, and the picketing was at all times properly directed against the primary employer alone, with no inducements, either at or away from the picket lines, of neutral employees to cease work other than the inducement offered by the picketing itself.

2. There is also involved in this case the question of whether there is substantial evidence in the record as a whole to support the Board's conclusion of a violation of Section 8(b)(4)(A).

STATUTE INVOLVED

In addition to Section 8(b)(4)(A) set forth in Appendix B of the Petition herein, Sections 7 and 13 of the Act, 29 U.S.C.A. 157 and 163, are directly involved in this case. These sections are as follows:

> "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid

or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

"Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

STATEMENT

To the statement of this case made by the petitioner (Petition, p. 3) the following should be added:

1. The work of the drivers of the ready-mix trucks at the construction sites consisted, for the most part, of pouring the concrete mixture into forms designated and provided by the contractors, and under the direction of the construction foreman, so that when the mixture became dry it became part of the structure of the project (J.A. 10(a) and 18(a)). Thus, in substance and effect the drivers, while working at the construction site, can be considered in the same category as any other group of craft employees on a construction job, such as bricklayers, carpenters or plumbers, engaged in contributing the work of their respective trades to the completion of the project as a whole.

2. Neither in its decision below, nor in its presentation to the Court of Appeals for the District of Columbia, nor in its presentation here, does the Board make any claim that the construction sites where the concrete was poured did not harbor an area of primary labor dispute between the respondent and the primary employer where that employer was engaged in carrying on a substantial, as distinguished from a

transitory or peripheral portion of his operations. While the record is not clear as to exactly how much of this working time was spent by the drivers at each construction site in pouring concrete into forms to become part of the building structure, it might reasonably be concluded (and the Board does not attempt to deny) that this was an operation of a more substantial and of a less fleeting nature than would be, for instance, the delivery of parcels or the delivery of soft drinks to some hundreds or even thousands of delivery points, as was the situation in the *Washington Coca-Cola* case (*Brewery & Beverage Drivers* v. *N.L.R.B.*, 220 F. 2d 380).

3. While, as indicated by the petitioner in its statement, the pickets did not communicate with other workers at the construction projects, either by way of asking them to respect the picket line and refrain from working or by telling them that the picketing was not intended as an appeal to them not to work, it was further expressly stipulated between petitioner and respondent in the proceedings before the Board below that

> "Except by the display of picket signs as herein described, General Counsel [of the Board] does not contend that the respondent [Union], through its pickets, officers, or otherwise, in any manner, threatened, coerced or intimidated employees to quit work, or that any other form of inducement or encouragement of employees, whether by way of union by-laws or rules (written or unwritten), threats, promises, or otherwise, existed." (J.A. 11(a).)

4. Even assuming, although respondent vigorously denies, that the Board has authority under the Act to evaluate the legality of picketing under Section 8(b)(4)(A) by reference to the effectiveness of such picketing, the Board in its decision made no finding of fact or conclusion of law that the

picketing at the employer's separate place of business was effective.

REASONS FOR DENIAL OF THE WRIT

1. The position taken by the petitioner in this case finds no support in the Act but, on the contrary, operates to deny rights given specific protection under that Act. The meticulous opinion of the Court of Appeals below so holds and that opinion demonstrates with ample force and persuasion the entire lack of merit in the Board's position as applied to the facts of this case. It is respectfully submitted that there is no need for this Court to review that decision.

It appears to be petitioner's central assertion that since the Board must reconcile the Act's "dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own" (*National Labor Relations Board* v. *Denver Building & Construction Trades Council*, 341 U. S. 675, 692), the Board has a right under the Act to prescribe a rigid formula under which peaceful primary picketing is automatically outlawed at a primary place of employment where neutral employers are more likely to be affected by the picketing, if such picketing can also be "effectively" carried on at another primary place of employment where neutrals are less likely to be affected. Thus, the legality of picketing is to be determined by the following two criteria: (1) whether picketing against a primary employer is carried on both at a so-called "common situs" of employment, where the primary employer and one or more neutral employers work together, as well as at his separate premises, and (2) whether in such a situation, the picketing can be "effectively" conducted at such separate premises alone.

In support of this position, the Board makes an argument having considerable surface appeal, based on what it terms a balancing of interests and taking into consideration what it deems to be the overall equities of the situation. However, the difficulty with this argument, persuasive as it may be, is that it is a legislative one best addressed to Congress in support of an amendment permitting the Board to do what it has attempted here. As so well expounded in the unanimous decision of the Court of Appeals below, the formula which the Board seeks to utilize in this case finds no sanction in the Act as it presently stands, is at variance with the single method of determining the legality of picketing presently prescribed in the Act, and would operate both to give the Board a large measure of roving discretion not presently entrusted to it, and to deprive of rights specifically protected under the Act. Surely, any attempt to reconcile the dual Congressional objectives referred to above must be by means within the framework of the Act and consistent with both its prescribed procedures and explicitly stated protections.

At the outset it should be noted that the Act nowhere contains any reference to a "common situs", nor does it attempt to draw a distinction between the legality of primary picketing as carried on at one rather than another place of operation of a primary employer. Furthermore, the Act nowhere speaks of picketing in terms of its "effectiveness", nor does it anywhere repose a discretion in the Board to evaluate the legality of picketing in terms of its adequacy at one rather than at another place of primary employment. This is as might be expected; the outcries which preceded and have followed passage of the Taft-Hartley Act in 1947 would have been as children's whispers compared to the outcries which would have accompanied any attempt by Congress to grant an administrative branch of the Government power to judge

and determine the validity of picketing by reference to an appraisal of how effectively it can be conducted.

The foregoing observations are equally true of the legislative history of the Act; nowhere in that legislative history is there mention made of the term "common situs" or a similar one, nor is there any discussion concerning the type of situation exemplified by the present case, nor is there indicated any intention on the part of Congress to outlaw picketing against a primary employer, if otherwise properly conducted and directed, merely because it is carried on at a place where other employers also conduct their operations. Thus, there can be found no support whatsoever either in the language of the Act or in its legislative history for the Board's attempt in the present case to proscribe picketing by reference to a "common situs" and "ability to picket effectively elsewhere" formula.

On the contrary, the Act sets forth just one type of picketing which is illegal under Section 8(b)(4)(A)—all other striking and picketing activities are expressly preserved—and the Board is limited to one approach in ascertaining whether violations of 8(b)(4)(A) have taken place. Section 8(b)(4)(A) proscribes picketing for the purpose of inducing employees to cease work only where "an object thereof is . . . forcing or requiring . . . any employer to cease doing business . . . with any other person". Thus, the test of unlawfulness set forth in the Act has reference solely to the objective of the picketing, and it is only by proof of the proscribed objective that picketing can be condemned. See, e.g., this Court in *N.L.R.B. v. Denver Building and Construction Trades Council*, 341 U. S. 675, at 687, where it is stated "We must first determine whether the strike in this case had a proscribed object", and in *I.B.E.W. v. N.L.R.B.*, 341 U. S. 694, at 704, where it is stated:

> ". . . 'It was the *objective* of the union's secondary activities . . . and not the *quality of the means* employed to accomplish that objective, which was the dominant factor motivating Congress in enacting that provision. . . ."

It is, therefore, the sole function of the Board to determine from the available evidence whether in each case the picketing in question was carried on for the proscribed object. This is far different from a roving commission to inquire into the effectiveness of picketing on the one hand and, on the other, to use a rigid situs formula of illegality as substitute for such proof. Indeed, far from the Act's granting any such commission or right, Congress made certain that traditional acts of striking and picketing against a primary employer were to be left undisturbed. Section 7 of the Wagner Act which gave original protection to these rights was retained verbatim in Taft-Hartley except only that there was added the right to refrain from the guaranteed concerted activities.[1] In addition, Section 13 of the Act requires that the Act be construed so as not "either to interfere with, impede, or diminish in any way the right to strike", except as may be specifically provided for in the Act, and, as we have seen, there is no provision in the Act, specific or otherwise, which in any way contemplates or countenances interference with the right of primary picketing in the manner which the Board has attempted in the present case. As stated by this Court in *Rice Milling (N.L.R.B. v. International Rice Milling Co.*, 341 U. S. 665, at 673):

> "That Congress did not seek, by § 8(b)(4), to interfere with the ordinary strike has been indicated recently by this Court. . . .

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[1] Section 7 which guarantees the right of "concerted activities for . . . mutual aid or potection" has long been held to include the right to strike and picketin support of economic demands. **N.L.R.B. v. Mackay Radio, etc.**, 304 U.S. 333, 58 S. Ct. 904, 82 L. Ed. 1381 (1938), and **Collins Baking O. v. N.L.R.B.** 193 F. 2d 483 (C.A. 5, 1951).

> "By 13, Congress has made it clear that § 8(b)(4), and all other parts of the Act which otherwise might be read so as to interfere with, impede, or diminish the union's traditional right to strike, may be so read only if such interference, impediment or diminution is 'specifically provided for' in the Act. No such specific provision in § 8(b)(4) reaches the incident here."[2]

Examination of the legislative history of the Act further discloses that Congress had no intention of proscribing traditional striking and picketing activities of labor organizations directed against employers with whom the union had a legitimate primary dispute; even the most fervent Congressional advocate of anti-union amendments to the Wagner Act during the period preceding Taft-Hartley did not urge outright prohibition of such fundamental rights because of their exercise at a place where both the primary employer and other neutrals were engaged in business. Thus both the language of the Act and its legislative history indicate conclusively that Congress intended to preserve, not destroy, the right of picketing against a primary employer involved in a primary labor dispute. "For the policy of the National Labor Relations Act is not to condemn all picketing but only that ascertained by its prescribed process to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing". *Garner v. Teamsters Union*, 74 S. Ct. 161, 346 U. S. 485, 98 L. Ed 228 (1954).

The starting point, then, in assessing 8(b)(4) violations in a common situs situation, is not, as proposed by the Board,

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[2] Although the reference in the decision is to "the ordinary strike", the Supreme Court obviously equated ordinary picketing with the ordinary strike, because, in **Rice Milling**, none of the employees of the employer against whom the picketing was directed engaged in the strike or in the picketing and, indeed, none were members of or sympathetic to the union. The "strike" actually was picketing for recognition or organizational purposes and consisted solely of picketing by members of the union who were not employees of the struck employer.

whether there is a separate primary place of employment where picketing can be effectively conducted, but rather whether at the common situs employees of the primary employer are engaged in a substantial manner, not transitorily or peripherally, in carrying on normal business operations of the primary employer. If so, then under the Act there is a right to picket the primary employer at that situs, unless it can be affirmatively shown under all of the circumstances by competent proof other than the act of picketing standing alone that a direct object is deliberate involvement of third party employees. The fact that other employees of other employers may also be employed at a particular site may make it necessary to take precautions against involvement [3] as by properly directed picket signs *(cf. I.B.E.W., Local 501,* 341 U. S. 694), but the fact of common employment does not *ipso facto* require, as the Board has here required, relinquishment of that right. That right is too fundamental and too important a one, embracing not only Sections 7 and 13 protections but also elements of free speech [4], to permit its denial unless clear proof of unlawful object is present. To use the exercise of the right as evidence of the illegality of object is to play fast and loose with the protections of the Act as well as those of the First Amendment.

It may well be that the incidental effect of picketing in this case, as indeed of any picketing, is to induce union sympathizers to refrain from crossing the picket line. But until this case the Board has not used such incidental effect as proof of

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[3] This duty to take precautions does not require that the pickets inform neutral employees that the picketing was not intended as an appeal to them. **Painters & Paperhangers (Pittsburgh Plate Glass Co.),** 110 NLRB No. 84.

[4] **Thornhill v. Alabama,** 310 U.S. 88; **American Federation of Labor v. Swing,** 312 U.S. 321.

unlawful object. On the contrary, the Board [5] and the courts [6] have directly repudiated the "incidental effect" argument on the ground that under it all primary concerted activity could immediately be outlawed, just as it could under the "everybody knows the effect of picketing" argument suggested by the Fourth Circuit in the *Stover Steel* case (*Piezonki v. N.L.R.B.*, 291 F. 2d 879, at 881).

2. The conclusion of the Board that the picketing which is proscribed herein was for an object made illegal under the Act is unsupported by any substantial evidence in the record considered as a whole.

Petitioner argues that since the respondent union had adequate opportunity to picket effectively at a place other than the construction or the common situs of employment, it is a fair conclusion, from the act of picketing at the construction site in itself, that the motive in so picketing was to involve employees of third party contractors. But why and on what premise can such conclusion be deemed a fair one? Is it not just as fair and certainly a more natural conclusion that the object of such picketing was the simple, obvious and traditional one of reaching Campbell's employees where most appropriate, i.e., where they perform substantial services for their employer. Certainly, picketing against Campbell would be greatly more effective if carried on where Campbell's drivers spend the major portion of their time rather than at the two plants where the drivers, coming and going as they do, are much less accessible and are present only 25% of the working day. The Building Trades cases in this Court [7] teach,

[5] Pure Oil, 84 NLRB 315; Ryan Construction Co., 85 NLRB 317.

[6] N.L.R.B. v. Service Trade Chauffeurs, Inc., 191 F. 2d 65 (C.A. 2, 1954); N.L.R.B. v. Local Union 55, 218 F. 2d 226 (C.A. 10, 1954).

[7] N.L.R.B. v. Denver Building and Construction Trades Council, 341 U. S. 675; International Brotherhood of Electrical Workers, Local 501, AFL, v. N.L.R.B., 341 U. S. 694; United Brotherhood of Carpenters and Joiners of America, AFL, v. N.L.R.B., 341 U. S. 707.

as we have seen, that the mere fact of common employment does not render properly directed picketing illegal. Here there is not a scintilla of supporting evidence, such as improperly directed picket signs, personal solicitations, connivance with other building trades unions, or the like, to bear out the Board's assumption of an unlawful object. It must be remembered that the stipulation between the parties herein makes clear that no "form of inducement or encouragement of employees, whether by way of union by-laws or rules (written or unwritten), threats, promises or otherwise" other than the mere display of the properly directed picket signs operated to induce employees of neutrals to quit work.

The Board's reasoning in this matter, utilizing as it does the exercise of a Section 7 right alone as proof of an object illegal under Section 8(b)(4), would dispense entirely with the Board's burden of proof in 8(b)(4) cases. "When the Board could as reasonably infer a proper motive as an unlawful one, substantial evidence has not proved the respondent to be guilty of an unfair labor practice." *N.L.R.B. v. Houston Chronicle Publishing Co.*, 211 F. 2d 848, 854 (C. A. 5, 1954). If the Board's reasoning is permitted to stand, there would be afforded an easy method of convicting of 8(b)(4) violations out of hand in respect to any picketing which evokes a response from employees of third parties. Surely, such a result was not intended by Congress.

This entire argument of the Board, under which it concludes an improper motive from the mere act of picketing at the common situs, even though the primary employer may be substantially engaged in business at that situs, and under which it assumes to evaluate the effectiveness of picketing, forgets that the right to picket, as traditionally conceived and carried on by unions, involves the right to picket wherever an employer with whom a dispute exists is carrying on his

normal activities and where his employees are working for him in other than a transitory manner. Picketing a primary employer in a labor dispute, to be truly effective, must necessarily carry with it the right to picket that employer in all his places of operation; any other rule could well render meaningless the exercise of that important right. For instance, in the present case, by what warrant can the Board conclude (although in its decision it did not expressly so find) that the picketing at the Campbell plants, where the employees report in and out and spend only 25 per cent of their time, is effective? For all we know or for all the record discloses, the plants may be so located, as in an isolated area, or their accessibility be such as to make picketing at the plants completely ineffective.

It is submitted that the Board has not only failed to assume its burden of proving an illegal object in the picketing here by substantial evidence, but has even failed to adduce proof in support of its own theory of effective picketing elsewhere. Certainly, no useful purpose can be served by review of this case on the basis of a record such as the present one.

3. The precise issue here involved has already been determined by this Court adversely to petitioner in *N.L.R.B. v. General Drivers, Warehousemen & Helpers Local 968*, No. 476, October Term 1955, certiorari denied, 350 U. S. 914, December 5, 1955. There, as indicated by the Board in its petition herein (p. 6), the broad question of the right of the Board to conclude that the mere extension of picketing to another place of operation of a primary employer where neutral employers are also at work constituted a violation of Section 8(b) (4) (A) was presented to this Court, and this Court declined review. If anything, the picketing in the present case, even more than the picketing in the Local 968 case above, is entitled to protection, for here the very employees

over whom the dispute existed were engaged in work at both places of employment rather, as in the Local 968 case, only at the primary employer's separate place of business.

The case of *N.L.R.B. v. Truck Drivers & Helpers Local No. 728*, 228 F. 2d 791 (CA 5, Jan. 17, 1956), which the petitioner asserts is in conflict with the decision of the Court below, is distinguishable on the ground that in that case, unlike the situation in the present case, the picketing did not disclose "clearly" that the dispute was with the primary employer. Similarly, the decision of the Second Circuit in *N.L.R.B. v. Associated Musicians of Greater New York, Local 802*, 226 F. 2d 900 (Nov. 3, 1955), is distinguishable upon the grounds set forth in f.n. 2 of the decision below (Petition, p. 22).

CONCLUSION

It is respectfully submitted that the formula of illegality of picketing under Section 8(b)(4)(A) of the Act utilized by the Board in this case, under which by rote it classifies all common situs picketing illegal where picketing can also be "effectively" carried on at another separate place of employment, is not sanctioned by the Act, and constitutes an abandonment by the Board of its function and duty both to protect Section 7 rights and to determine in each case, on the basis of substantial evidence, that an actual—not an incidental—object of the picketing is to involve third party neutrals. The Petition herein should be dismissed.

Respectfully submitted,

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